I would, therefore, dismiss the appeal with costs and would order any deposit that may have been made to be dealt with in the usual way.

Abdul Hamid J. and **Neal J.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; Braddell & Ramani.*

A. GABRIEL & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Shepherd J.) February 4, 1957]

[J. B. — Criminal Appeal No. 42 of 1956]

Criminal Trial — Duty of prosecution to produce witnesses — Accused's explanation consistent with innocence.

The only duty which rests upon the prosecution is to produce, or to agree to produce, if they can, witnesses from whom they have taken statements and who are in a position to give material evidence upon issues about to be tried. The prosecution are not bound to put such witnesses into the witness box, but they have to make them available to the defence.

If a reasonable explanation is given by an accused which is consistent with innocence and which is of such a nature that it leaves the Court in doubt as to whether the accused is innocent or guilty, then the benefit of that doubt must be given to the accused.

Cases referred to:—

(1) *R. v. Bryant & Dickson* 31 Cr. App. R. 146.

(2) *R. v. Beecham* (1921) 3 K.B. 464.

MAGISTRATE'S CRIMINAL APPEAL.

R. Murugason for the appellant.

Bahaudin (Federal Counsel) for the respondent.

Shepherd J. : — This was an appeal by the two appellants against conviction upon the following charges laid against them respectively :—

"That you at about 11 p.m. on 25-7-56 at the Customs Inward Gate, Johore Bahru, being a passenger in a Green Bus from Singapore after having denied that you had any dutiable goods were found to have upon your person dutiable goods, to wit 1 pair of gold bangles, 2 gold chains, 16 pairs of gold attachments to the ear-ring, 3 gold rings and 2 pairs of gold pendants and that you did thereby commit an offence contrary to section 131(i)(f) and punishable under section 131(1)(i) of Customs Ordinance No. 42 of 1952."

"That you (Thangavelloo s/o Rengasamy) at about 11 p.m. on 25-7-56 at the Customs Inward Gate, Johore Bahru, were concerned in importing uncustomed goods to wit 1 pair of gold bangles, 2 gold chains, 16 pairs of gold attachments to the ear-ring, 3 gold rings and 2 pairs of gold pendants and that you did thereby commit an offence contrary to section 131(1)(a) and punishable under section 131(1)(i) of the Customs Ordinance No. 42 of 1952."

There was a joint trial and a joint petition of appeal from the decision of the learned President of the Sessions Court, Johore Bahru. The petition was in the following terms :—

"(a) the prosecution had not proved its case beyond all reasonable doubt in that,

(i) it had not called all material witnesses concerned in the case.

(ii) that there were discrepancies in the evidence (here particulars of alleged discrepancies were set out).

(b) the learned President of the Sessions Court erred in law when he formed the opinion that it is for the appellants to call the Malay R.O. who was in charge of the machine in the revenue collection room.

(c) the appellants have given a reasonable explanation and their evidence was supported by D.W. 3 who is an independent eye witness whereby the appellants should be given the benefit of the doubt.

(d) that the verdict of the learned President of the Sessions Court should be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence."

With regard to the first ground of appeal, namely, that the prosecution had not called all material witnesses, it was urged by learned counsel for the appellants that it was the plain duty of the prosecution to call the Revenue Officer who was a witness to some of the events which took place in the revenue collection room. Shortly, the Revenue Officer was alleged by the defence to have been in a position to corroborate the defence on the issue as to whether or not the second appellant (the gold-smith) was ready and willing to pay the duty payable on the articles which, both appellants said, they had freely admitted having brought into the Federation of Malaya.

It was urged that this witness may have been able to give evidence on this particular point. According to the prosecution evidence (it may be inferred), he closed his collecting machine and left the room when it became apparent that the appellants had been caught red-handed in an attempt to smuggle dutiable articles into the Federation. The appellants not having more than $5 between them, it was quite obvious that nothing would be received by way of duty.

The defence urged that he left for quite another reason, namely, that he was told not to accept any duty, presumably because the Revenue Officer wanted to conjure up a case against the appellants in order to secure a reward. They had the money but he (the man at the machine) was not prepared to accept it: that was their case.

The only duty which rests upon the prosecution is to produce, or to agree to produce, if they can, witnesses from whom they have taken statements and who are in a position to give material evidence upon issues about to be tried. The prosecution are not bound to put such witnesses into the witness box, but they have a duty to make them available to the defence. It is stated by the learned Editor of *Woodroffe & Ameer Ali's* Law of Evidence (9th edition) at p. 721 that :—

"It is the duty of the prosecution to produce all available witnesses and not merely those who support the charge. And when the prosecution refrains from calling witnesses able to give important evidence, an inference adverse to it may be drawn."

I do not altogether agree with this statement of the law or practice as here expressed, in so far as it might be taken to apply to the Federation of Malaya : I prefer that made by the learned editors of *Archbold's* Criminal Pleading, Evidence and Practice (33rd edition) at p. 516, where the position is stated as follows :—

"Where the prosecution have taken a statement from a person who can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence, but they are not under the further duty of supplying the defence with a copy of the statement which they have taken. **R. v. Bryant & Dickson.**[1]

It would be an embarrassing duty and one impossible to discharge if the prosecution were obliged to call or even to produce every witness who might, on any conceivable view, be in a position to give material evidence. In the present case, there might have been ten Revenue Officers present in the room for varying periods of time who were in a position to give material evidence. Generally (depending on the circumstances) a Court will consider that the prosecution have discharged the sort of duty referred to by the learned Editor of *Woodroffe and Ameer Ali's* Law of Evidence, if two or three witnesses have been called to give evidence of the type of events conecrned in this appeal, provided they have also supplied particulars to the defence of any witnesses from whom statements have been taken. No general rule can, of course, be laid down as to the number which may be regarded as sufficient to establish any fact. If an analogy may be drawn with trials for offences connected with the Road Traffic Act in England, a consideration of the practice of the Metropolitan Police may be of interest. On page 674 of the *Criminal Law Review* ((1956) Cr. L.R. 655-720) the learned authors referred to this practice in the following terms :—

"It is certainly the practice of the Metropolitan Police and we believe of many county constabularies to provide the defence in motoring cases with the names and addresses of witnesses who are not going to be called by the prosecution."

This practice, which obviously commends itself to the subsidiary courts in England, is a practice which might well be considered in connection with revenue cases in this country, in which statements have been taken from witnesses whom it is not proposed to call.

As to the duty of the prosecution to call a witness as distinct from producing him (or supplying his address), the following observations of Hawke J. in a case cited by "The Justice of the Peace" (see (1936) M.L.J. lxxxviii), namely *R. v. Beecham*[2] may be of interest :—

"I think that the people in charge of prosecutions must to some extent exercise their own discretion as to whom they should call, and I think that the true limit to it is that they must give the defence the whole of the information they have got in their hands in case the defence should desire to use it, and so that no unfairness should be visited upon a defendant. Under those circumstances I do not propose to insist upon the prosecution calling this witness."

The witness, a doctor; upon one view of the facts, could have given evidence conflicting with that given by another medical witness for the prosecution, though, upon another view, the evidence would not have conflicted.

With regard to ground (a) (ii), it will be unnecessary for me to go at length into the evidence which had been called for the prosecution and for the defence and into the lengthy arguments of learned counsel at the hearing of the appeal. Suffice it to say that I had considered the evidence on the record and agreed with the learned President that, in so far as there were discrepancies in the evidence of the prosecution witnesses, they were not material from the point of view of credit. I found that there was sufficient evidence to support a conviction against each of the appellants and the learned President, in my view, was rights in convicting in each case.

Ground (b) of the appeal merely set out in another form the ground under (a) (i) and I need not deal with it further.

Ground (c) urged that a reasonable explanation was given by the the appellants which should have been accepted by the learned President. In point of fact, he did not accept the explanation, did not consider it reasonable, an considered in fact that it was false. With this view I agreed. I bore in mind that if a reasonable explanation is given by an accused which is consistent with innocence and which is of such a nature that it leaves the Court in doubt as to whether the accused is innocent or guilty, then the benefit of that doubt must be given to the accused. That was not the situation here — the learned President was not in doubt, and I see no reason why he should have been.

Under ground (d), it was submitted that the learned President's verdict was unreasonable, having regard to the evidence. I have dealt sufficiently with this aspect of the matter and it is unnecessary for me to say anything more.

On the issue of the weight of the evidence, the learned President found upon sufficient evidence that the prosecution had discharged the onus placed upon them and I saw no reason why I should upset his finding. For these reasons, I dismissed both appeals.

Appeal dismissed.

Solicitors : *R. Murugason & Co.*